HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

WPMS 717/06

Shanti Lal Mewar,

Vs

Jaya Nand Khanduri,

& others.

Approved for reporting

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~~Not approved for reporting~~

Date of decision: 14.06.2006

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 717 (MS) OF 2006

Shanti Lal Mewar,
S/o late Sri Girdhar Mewar,
R/o village Toliyoun,
Post Office Srikot Ganganali,
District-Pauri Garhwal. .....Petitioner.

Versus

1. Jaya Nand Khanduri, S/o Sri Guna Nand Khanduri , R/o Village Quirali Post Office Khandah, District Pauri Garhwal.
2. The New India Insurance Company Limited Srinagar, through Divisional Manager, Ranipur Mode, Haridwar.

.....Respondents.

Dated: 14.06.2006

Hon'ble Rajesh Tandon, J.

Heard Sri Hari Mohan Bhatia, Advocate for the petitioner. I have also called Sri T.A. Khan, a counsel of the New India Insurance Co., who was unable to accept the notice for want of proper instruction.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the impugned Award/Judgment dated 30.03.2006 (Annexure No. 3) passed by the MACT/District Judge Rudraprayag in MAC Case No. 45 of 2005.

Briefly stated, the petitioner is the owner of the Motor Vehicle Bus No. UP 06/3930 and the same met with an accident on 02.09.2005. As a result of the accident, respondent no. 1 got injured and a claim petition was filed

before the MACT Rudraprayag bearing No. 45 of 2005 for an amount of Rs. 1,40,000/- against the petitioner and the respondent no. 1.

A written statement was filed on behalf of the respondent no. 2 against the claim petition under section 163 of Motor Vehicle Act.

In paragraph no. 11 of the written statement, it has been stated that the claimant has not produced the relevant documents i.e. Medical Bills, F.I.R., D.L., R.C., Permit, Tax return proof, Insurance etc in respect of the vehicle and was not in accordance with the policy of the insurance company. The Insurance Company has not specifically taken any plea with regard to the fake licence and has only stated that the vehicle in question was derived against the policy of the company.

The Claims Tribunal has framed as many as five issues.

While deciding the issues no. 1 and 2, the findings were recorded that it was proved from the evidence on record that the accident had taken place on 2nd September, 2005, in which respondent no. 1 was traveling and suffered injuries. So far as the issue no. 2 with regard to the liability of the Insurance Company is concerned, the finding was recorded that the vehicle was insured with the New India Insurance Company and the company is liable for whole liabilities. The said finding is quoted below:-

"As far as the insurance is concerned, the owner of the vehicle has filed paper No. Ga-12/2 to Ga-12/6 which shows that this vehicle was insured with the New India Insurance Company Ltd. vide Police No. 321904/31/04/06691 and was insured from 9-3-2005 to 8-3-2006 for whole liabilities while the accident occurred on 2-9-2005. From the perusal of record it appears that the opposite

Party has no where stated that this vehicle was not insured with him at the time of accident. So, it is clear that the said vehicle was insured with the New India Insurance Company Ltd for whole liabilities. This issue is decided accordingly."

Issue No.3 was to the effect as to whether the driver had a valid driving licence. So far as the issue no. 3 is concerned, a finding was recorded that the driver had no valid licence and therefore, the liability cannot be shifted on the Insurance Company.

In view of the finding on issue no.3, the claims tribunal has although allowed the claim petition, but has directed the Insurance Company to recover the amount from the owner.

Issue no. 4 and 5 related to the compensation. It has come on record that the claimant was insured and the ends of justice to be made by granting the compensation on account of her medical expenses incurred by her.

The Tribunal has referred the judgment of ***National Insurance Company Vs. Swarn Singh 2004 (3) SCC 297*** to the following effect:-

"After taking into count the legal preposition as laid down by the Hon'ble Supreme Court in National Insurance Company vs. Swarn Singh (SUPRA) the insurance company is entitled to recover the party N0. 1, the owner of the vehicle has mentioned in his written statement that the bus was driven by a driver holding valid driving license."

In ***Narcinva V. Kamat Vs. Alfredo Antonia Doe Martins 1985(2) SCC 574,*** is has been held as under:-

"14. The last question is whether he had a valid driving licence. The High Court has not recorded a clear cut finding on this point. The finding of the Tribunal is more evasive than the one by the High Court. Mr. Sharma did not dispute that the second appellant had a driving license. His grievance is

that he having failed to produce the same when called upon to do so in the cross-examination, an adverse inference be drawn against him that he did not have a valid licnece to dreive a pici-up van. The submission fails to carry conviction with us. The burden to prove that there was breach of the contract of insurance was squarely placed on the shoulders of the insurance company. It could not be said to have been discharged by it by a company. It could not be said to have been discharged by it by a mere question in cross-examination. The second appellant was under no obligation to furnish evidence so as to enable the insurance company to wriggle out its liability under the contract of insurance. Further the R.T.A. which issues the driving licence keeps a record of the licences issued and renewed by it. The insurance company could have got the evidence produced to substantiate its allegation. Applying the test who would fail if no evidence is led, the obviouis answer is the insurance company.

15. To sum up the insurance company failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance company failed to prove that aspect, its liability under the contract of insurance remains intact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance."

In ***National Insurance Company Vs. Swarn Singh 2004 (3) SCC 297,*** the Apex Court has relied upon the judgment of ***Narcinva Case (1985) 2 SCC 574*** and has observed that the Insurance Co. cannot discharge his burden

regarding the driving licence of the driver. The observations of the Apex Court are quoted below:-

"39. The question as to whether an insurer can avoid its liability in the event it raises a defence as envisaged in sub-section (2) of Section 149 of the Act corresponding to sub-section (2) of Section 96 of the Motor Vehicles Act, 1939 had been the subject-matter of decisions in a large number of cases.

40. It is beyond any doubt or dispute that under Section 149(2) of the Act, an insurer, to whom notice of the bringing of any proceeding for compensation has been givn, can defend the action on any of the grounds mentioned therein.

41. However, clause (a) opens with the words "that there has been a breach of a specified condition of the policy", implying that the insurer's defence of the action would depend upon the terms of the policy. The said sub-clause contains three conditions of disjunctive character, namely, the insurer can get away from the liability when (a) a named person drives the vehicle; (b) it was being driven by a person who did not have a duly granted licence; and (c) driver is a person disqualified for holding of obtaining a driving licence.

52. In Narcinva case (1985) 2 SCC 574, Division Bench of this Court observed: (SCC p. 578, para 12):-

"The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of a term of contract permits a party to the contract to not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led.

69. The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See Sohan Lal Passi).

73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory."

As will appear from the aforesaid judgment that mere absence fake or invalid driving licence or disqualification of the driver or driving at the relevant time or not in themselves defence is available to the insurer either against the insured or the 3rd party to avoid its liability towards the insured. The insurer has to prove that the insured is guilty of negligent driving and he has not valid driving licence.

The M.A.C.T./District Judge Rudra Prayag has passed an order that the Insurance Company is permitted to recover the imposed compensation through proper forum when in point of fact as laid down by the Apex Court in the case of the ***National Insurance Company Vs. Swarn Singh 2004 (3) SCC,*** the insurer has failed to prove that the driver had no licence or otherwise and therefore, the entire liability cannot be shifted upon the owner. Opportunity to the insurer was required to be given to prove regarding the fact that the driver had valid licence or not. It is also proved that the driver died on the spot during the accident and as such it was for the insurer to prove to the contrary while deciding the issue no. 2 it has come on the record that the said vehicle was insured with the New India Insurance Company for whole liability in

order to discharge the liability of the Insurance Company, therefore, it was required for the Insurance Company to prove to the contrary.

In view of the above, issue no. 3 requires reconsideration by the claims tribunal in the light of the judgment of the Apex Court in National Insurance Co. Vs. Swarn Singh (supra), the matter is remitted to the District Judge/Claims Tribunal for deciding the issue no. 3 afresh in the light of the observations made above.

Writ petition is partly allowed. No order as to costs.

(Rajesh Tandon, J.)

14.06.2006
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